

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>VICKI HARVELL</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 176,051
<b>SUPERIOR INDUSTRIES INTERNATIONAL, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>SELF-INSURED</b>	)	
Insurance Carrier	)	

**ORDER**

**ON** the 23rd day of November, 1993, the application of the respondent for review by the Workers Compensation Appeals Board of an Award of Penalties entered by Administrative Law Judge John D. Clark on October 28, 1993, came on for oral argument by telephone conference.

**APPEARANCES**

The claimant appeared by and through her attorney, William L. Phalen, of Pittsburg, Kansas. The respondent and self-insured Superior Industries International, Inc., appeared by and through their attorney, John I. O'Connor, of Pittsburg, Kansas. There were no other appearances.

**RECORD**

The record before the Appeals Board consists of:

- (1) All documents filed of record with the Division of Workers Compensation under Docket No. 176,051, including the various pleadings filed by the parties;
- (2) Transcript of proceedings on May 5, 1993; and
- (3) Transcript of proceedings held on October 28, 1993.

**ISSUES**

- (1) Whether the Appeals Board has jurisdiction to hear an appeal from an award of penalties under K.S.A. 44-510a.
- (2) Should penalties be assessed against respondent pursuant to K.S.A. 44-510a for failure to pay temporary total or provide medical benefits as ordered?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

- (1) The Appeals Board has jurisdiction of this appeal as it is from a final order. An award of penalties

under K.S.A. 44-512a is not a preliminary award. It is a separate proceeding and is subject to de novo review on the record as a final order upon written request made within ten days from entry of the order. See, Stout v. Sixon Petroleum, 17 Kan. App. 195, 836 P.2d 1185 rev. denied 251 Kan. 942 (1992);

(2) The record does not support the decision to award penalties in this case. The record reflects that by order of the Administrative Law Judge dated May 24, 1992, respondent was required to provide medical care and pay temporary total benefits. On July 12, 1993, claimant filed a demand for payments pursuant to the order stating that penalties would be sought if the benefits were not provided. On August 25, 1993, claimant filed an "Application for Penalties," and served a notice of hearing to be held September 24, 1993.

Counsel for the parties agree that no evidentiary hearing was held on September 24, 1993, but disagree as to precisely what did occur. Claimant's counsel indicates claimant could not appear because of flooding from a rain storm and that the hearing was rescheduled for October 28, 1993. Respondent's counsel indicates he agreed to see that the benefits were provided and no second hearing was scheduled. No record was made and the Appeals Board has nothing other than the statements of counsel made in oral argument to consider.

Both parties were present for the docket of October 28, 1993, and a brief record was made. That record indicates that when the case was called, respondent's attorney stated he had no notice of hearing and was not prepared to present evidence. Respondent's attorney was present for other cases. Claimant's attorney advised the court the matter had been continued from the September setting by agreement and advised that respondent's attorney was present when it was continued. Without evidence presented by either party the matter was taken under advisement and the presently appealed order for penalties was entered on that same date.

The Appeals Board finds the record insufficient to support the award of penalties. There was, in fact, no evidence presented. The Appeals Board therefore reverses the decision to award penalties and remands the matter to the Administrative Law Judge to hear evidence.

Without attempting to judge which version of the facts is accurate, the Appeals Board does direct that upon remand, since the evidentiary hearing will be necessary, the Administrative Law Judge should hear and permit presentation of evidence on the record by both claimant and respondent.

**WHEREFORE**, the order of Administrative Law Judge John D. Clark, dated October 28, 1993, assessing the penalties against the respondent in this case is hereby vacated, and this action is remanded with directions that the Administrative Law Judge conduct an evidentiary hearing upon proper notice with opportunity for both claimant and respondent to present evidence relating to claimant's application for penalties.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of December, 1993.

\_\_\_\_\_  
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

cc: William L. Phalen, P.O. Box 1346, Pittsburg, Kansas 66762

John I. O'Connor, P.O. Box 1236, Pittsburg, Kansas 66762  
John D. Clark, Administrative Law Judge  
George Gomez, Director